2004

Ralph Leroy Menzies v. Hank Galetka : Opening Brief of Appellant

Utah Supreme Court

Assistant Attorneys General; Thomas B. Brunker and Erin Riley; Attorneys for Mr. Galetka.
Elizabeth Hunt; Attorney for Mr. Menzies.

IN THE UTAH SUPREME COURT

RALPH LEROY MENZIES,

Petitioner/Appellant,

v.

HANK GALETKA,

Respondent/Appellee.

Case No. 20040289-SC

OPENING BRIEF OF APPELLANT

This is the opening brief of appellant in a capital post-conviction case presided over by the Honorable Raymond S. Uno and Pat B. Brian, Judges of the Third District Court, Salt Lake County, State of Utah.

ASSISTANT ATTORNEYS GENERAL
THOMAS B. BRUNKER AND ERIN RILEY
160 EAST 300 SOUTH, 6TH FLOOR
P.O. BOX 140854
SALT LAKE CITY, UT, 84114-0854

ATTORNEYS FOR MR. GALETKA

ELIZABETH HUNT L.L.C.
ELIZABETH HUNT (5292)
569 BROWNING AVE.
SALT LAKE CITY, UTAH 84105
(801)461-4300

ATTORNEY FOR MR. MENZIES

IN THE UTAH SUPREME COURT

RALPH LEROY MENZIES,	:	
Petitioner/Appellant	:	
v.	:	
HANK GALETKA,	:	Case No. 20040289-SC
Respondent/Appellee.	:	

OPENING BRIEF OF APPELLANT

This is the opening brief of appellant in a capital post-conviction case presided over by the Honorable Raymond S. Uno and Pat B. Brian, Judges of the Third District Court, Salt Lake County, State of Utah.

ASSISTANT ATTORNEYS GENERAL
THOMAS B. BRUNKER AND ERIN RILEY
160 EAST 300 SOUTH, 6TH FLOOR
P.O. BOX 140854
SALT LAKE CITY, UT, 84114-0854

ATTORNEYS FOR MR. GALETKA

ELIZABETH HUNT L.L.C.
ELIZABETH HUNT (5292)
569 BROWNING AVE.
SALT LAKE CITY, UTAH 84105
(801)461-4300

ATTORNEY FOR MR. MENZIES

TABLE OF CONTENTS

ABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

Other Authorities

IN THE UTAH SUPREME COURT

RALPH LEROY MENZIES,

:

Petitioner/Appellant

:

v.

:

HANK GALETKA, Case No. 20040289-SC

:

Respondent/Appellee.

:

JURISDICTION

Utah Code Ann. § 78-2-2 (i) provides this Court's jurisdiction over this appeal.

ISSUES, PRESERVATION AND STANDARDS OF REVIEW

1. Did the trial court err in denying Menzies relief under 60(b)?

A denial of relief under 60(b) is generally reviewed for an abuse of discretion, but denials under 60(b)(4) are reviewed without deference as a matter of law.[1] Trial courts have limited discretion to deny relief from default judgments, and are to favor those seeking relief in doubtful cases, so that parties can have their day in court.[2] When defaults result from genuine mistakes or are reasonably excusable, courts are to grant relief. Id. at ¶ 10. A trial court's discretion is abused if the court's ruling legally incorrect or based on inadequate findings. Id. ¶ 9.

This issue was raised in the trial court (e.g. R. 2271, 2322-2352, 2648-2804).

---

[1]See Franklin Covey Client Sales Inc. v. Melvin, 2000 UT App 110, ¶¶ 8 and 9, 2 P.3d 451.

[2]Lund v. Brown, 2000 UT 75 at ¶ 10, 11 P.3d 277.

2. Must the trial court's attempts to cure its violation of Salt Lake Legal Defender Ass'n v. Uno, 932 P.2d 589 (Utah 1997), be augmented?

A trial court's discovery orders are reviewed for an abuse of discretion.[3]

This issue was raised in the trial court (e.g. R. 3632-3636, 3495-3500, 3504-3509).

3. To the extent that the issues raised on appeal were raised imperfectly in the trial court, should this Court nonetheless address them under the plain error doctrine, and in the course of exercising its supervisory powers over the lower courts in this capital habeas case?

This issue is raised for this Court's determination for the first time on appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The pertinent constitutional provisions, statutes and rules are in the addendum.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

Menzies is an indigent death row inmate who appeals from the trial court's denial of his motion for relief from the default summary judgment and preceding default orders which entered against him in his capital post-conviction case as a result of his appointed lawyer's defaulting away Menzies' rights without his knowledge or consent (e.g. R. 3910-3911).[4]

---

[3]See, e.g., Green v. Louder, 2001 UT 62, ¶ 37, 29 P.3d 638.

[4]All citations in this brief are to the civil record.

With regard to the criminal record, Menzies maintains all positions originally set forth in the motion and appeal regarding the inadequacy of the record, and notes that the record problems are exacerbated by the facts that the majority of the criminal record was lost after Menzies' direct appeals, that no court reporter was present at the hearing on January 29, 1997 (R. 1044), and that the court held unrecorded bench conferences in the civil case (R. 4126 at 176-203). See State v. Suarez, 793 P.2d 934, 936 n.3 (Utah App. 1990)(in courts of record, all proceedings, including bench conferences, must be recorded).

As indicated in the motion to supplement the record, counsel for Menzies has supplemented the criminal record with as many replacement transcripts as she could locate,

FACTS RELEVANT TO APPEAL

LDA represented Menzies in his capital trial and appeal and did not allege ineffective assistance on appeal (R. 4121 at 50-51).

In post-conviction, Mary Corporon and other *pro bono* lawyers asserted ineffective assistance by LDA, that the LDA investigation was inadequate, and that an adequate investigation would prove Menzies' innocence (R. 4121 at 21, 32, 39; R. 1031-1040). Corporon reviewed the LDA files and found "precious little" addressing the "guilt phase question." (R. 4121 at 50-51). After talking with the LDA trial lawyers, she believed that there was not a deliberate decision by LDA to abstain from investigating Menzies' innocence, and that the failure to conduct an adequate investigation was attributable to a lack of resources and "things getting lost in the shuffle." (R. 4121 at 50-51).

After Judge Uno recognized that some legal defenders are often "walking malpractice cases" (R. 4121 at 53-55), he ruled that investigative funding was essential for Menzies to exercise his right to habeas corpus, and ordered the State to pay Corporon $2,000 to investigate Menzies' claim of innocence (R. 573, 603-10, 716, 871-72, R. 4121 at 49-58). When the Post-Conviction Remedies Act came into effect, the State moved to replace Corporon and her co-counsel for lack of Rule 8 qualification (R. 1145-1153, 1170-73).

The court, Corporon, and the State conducted a three-month search for Rule 8 qualified counsel, during which several qualified attorneys refused the case (R. 4131 at 3-6, 7-9, R. 1159-60, 1162-69, 1182-84, 1213, R. 4135 at 1-2).

---

but has no personal knowledge that the replacement transcripts are accurate copies of what was lost.

Edward K. Brass was the only lawyer willing and able to take the case, and the court appointed him without inquiring into his qualifications under Rule 8, after Corporon indicated that everyone agreed that Brass was Rule 8 qualified (R. 4135 at 2-6).

Brass never investigated Menzies' case, despite the availability of the $22,000 from Judge Uno's order and the PCRA, despite having had the case for roughly 5 ½ years, and despite record indications of Menzies' claims of innocence and the wholly inadequate guilt and mitigation investigations by LDA (e.g. R. 0131-1040, 1162-69, 2303, 2639, R. 4121 at 21, 32, 39, 50-51).

Brass defaulted Menzies' claims by failing to investigate the case prior to filing his twice-late two-page amended petition (R. 1231-32, 2303, 2639), failing to attend to discovery obligations (R. 4136 at 13; R. 2642-43, 1780-1805, 1883, 1886-87), sending an unqualified and unprepared lawyer to represent Menzies in his deposition (R. 1790-1805), failing to respond to the motions to compel and for discovery sanctions (R. 1824-25, 1858-1958, 1959-64, 1965-2089, 2090-2102), failing to oppose summary judgment (R. 2106-2233, 2234-64), failing to support the motion to set aside the summary judgment with a memorandum (R. 2271), and failing to perfect the appeal despite having received numerous opportunities to do so (see law and motion file in Case No. 2002-124-SC).

There were no hearings prior to Judge Uno's entry of the default orders, and Menzies did not receive prior notice of any of Brass's defaults (R. 2303, 2307, R. 4125 at 79-80, R. 4126 at 166).

After Brass moved for relief under 60(b), the State did not move to strike or seek a hearing on or otherwise resolve its motion to file a late response (R. 2597). The State later claimed that

Menzies' time to file for relief in federal court had run in June of 2003 (R. 2363).

On July 21, 2003, after attending a conference and being asked to insure that none of Utah's death penalty cases was falling through the cracks, present counsel for Menzies called Assistant Attorney General Thomas Brunker and asked him about that issue and Mr. Brunker then informed counsel of Menzies' case (R. 2645-46). When present counsel brought Menzies a copy of the docket proving Brass's defaults on August 12, 2003, Menzies signed the affidavit seeking new counsel, and counsel and began filing documents on Menzies' behalf to obtain relief from the default orders and to obtain the appointment of new counsel (R. 2280-2353, 2635).

Judge Brian denied Menzies relief under Utah R. Civ. P. 60(b) (4), because the court did not act in a manner inconsistent with due process (R. 3723-3754). The court ruled that Menzies was not entitled to relief under subsection (1) of Utah R. Civ. P. 60(b), because Brass's ineffective representation of Menzies was not mistaken or excusable, but appeared to be willful and deliberate gross negligence (R. 3722-3723, 3735-3738 and n.3). The court denied relief under subsection (5), because the summary judgment was not prospective, and because the presentation of proof that Menzies was unaware of the defaults until after the fact did not show a change in circumstances rendering the defaults inequitable (R. 3724-3726, 3755-3756). The court recognized that gross negligence of counsel can qualify for relief under subsection (6), but denied Menzies relief under both subsection (6) and subsection (1) of Rule 60(b) because Menzies failed to act as a reasonably prudent person in the circumstances of his case because he did not "immediately and repeatedly contact the court" and dismiss Brass as his lawyer (R. 3738-3751, 3756-3763, 3769).

SUMMARY OF ARGUMENTS

Menzies is entitled to relief from the default summary judgment and preceding default orders under Utah R. Civ. P. 60(b)(1),(4), (5) and (6).

The trial court's rule holding Menzies accountable for his appointed lawyer's defaults is legally incorrect because it results in Menzies' waiver of fundamental constitutional rights by accident, and thus conflicts with basic constitutional law requiring the waiver of such rights to be knowing and voluntary. The trial court's ruling holding Menzies accountable for Brass's defaults is untenable because it hinges on clearly erroneous and inadequate findings of fact.

The trial court's efforts to cure its violation of Salt Lake Legal Defender Ass'n v. Uno, 932 P.2d 589 (Utah 1997), are inadequate and require augmentation.

To the extent that counsel imperfectly preserved the issues, this Court should apply the plain error doctrine to correct all of the prejudicial errors which occurred.

This Court should exercise its supervisory powers over the lower courts in deciding the important policy questions this case presents regarding procedure in the cases of indigent capital post-conviction petitioners.

ARGUMENTS

I.
MENZIES IS ENTITLED TO RELIEF UNDER UTAH R. CIV. P. 60(b).

A. MENZIES IS ENTITLED TO RELIEF UNDER 60(b)(4).

1. THE DEFAULT RULINGS WERE VOID FOR LACK OF DUE PROCESS.

A ruling is void under 60(b)(4) "as against persons to whom due process has not been accorded in its rendition." Workman v. Nagle, 802 P.2d 749, 752-54 (Utah App. 1990).

Due process of law requires that everyone "have his day in court – that is each party shall have the right to a hearing before a competent court, with the privilege of being heard and

introducing evidence to establish his cause or defense, after which comes the judgment on the record thus made."[5] In cases wherein life is at stake, the person must be afforded:

> ...(b) an inquiry into the merits of the question by such person, body or agency; (c) notice to the person of the inauguration and purpose of the inquiry and the time at which such person should appear if he wishes to be heard; (d) right to appear in person or by counsel; (e) fair opportunity to submit evidence, examine and cross-examine witnesses; (f) judgment to be rendered upon the record thus made.

Id.

The court should have granted Menzies relief under 60(b)(4), because the default summary judgment and preceding default orders entered without Menzies receiving due process elements (b) through (f), *supra* (R. 2303, 2307, R. 4125 at 79-80, R. 4126 at 166).[6]

Constitution of Utah, Article I § 11 "guarantees access to the courts and a judicial procedure that is based on fairness and equality."[7] Under this provision, courts are to "resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy."[8] "At a minimum, a day in court means each party shall be afforded the opportunity to present claims and defenses, and have them adjudicated on the merits according to the facts and the law."[9]

The Fourteenth Amendment requires states to provide inmates legal assistance or other meaningful opportunities for them to challenge the violation of their fundamental constitutional

---

[5]Christiansen v. Harris, 163 P.2d 314, 316-17 (Utah 1945) (citations omitted)(interpreting Art. I § 7 and the Fourteenth Amendment).

[6]See Workman, *supra.*

[7]Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985).

[8]Carman v. Slavens, 546 P.2d 601, 603 (Utah 1976).

[9]Miller v. USAA Cas. Ins. Co., 44 P.3d 663, 674-75 (Utah 2002).

rights in post-conviction.[10] The need for inmates' access to the courts is most critical in capital cases.[11] In criminal and quasi-criminal cases, state courts are obligated to insure that access to the courts is available to everyone on an equal basis.[12]

In Utah capital post-conviction cases involving indigent petitioners, the rights of due process and access to the courts and open courts are to be met by the specially qualified counsel, who are required to provide "all reasonable and necessary post-conviction legal services for the client, up through appeal" to this Court. See Utah Code Ann. § 78-35a-202, Utah R. Crim. P. 8, Utah Admin. Code R. 25-14-3.

Rather than insuring that Menzies had a meaningful opportunity to present his claims of innocence and constitutional violations in this capital case, and to have his day in court with counsel so that his claims were resolved on the merits, however, Brass defaulted away Menzies' rights without Menzies' knowledge or consent, and the court entered all of the default rulings without Menzies ever having notice or a hearing (R. 2303, 2307, R. 4125 at 79-80, R. 4126 at 166). This violated Menzies' rights to due process, open courts, and access to the courts,[13] and

---

[10]See Bounds v. Smith, 430 U.S. 817, 821-28 (1977) (*plurality*); Christopher v. Harbury, 536 U.S. 403, 415 n.12 (2002).

[11]Cf. Murray v. Giarratano, 492 U.S. 1, 14-15 (1989) (*plurality*) (Kennedy, concurring) (recognizing unsettled question regarding the extent of assistance states must provide indigent state death row prisoners challenging their convictions or death sentences in post-conviction proceedings in capital cases); 14-32 (Stevens, Marshall, Brennan, Blackmun, dissenting) (arguing that Eighth and Fourteenth Amendments require states to provide appointed counsel to indigent capital defendants in state post-conviction).

[12]Cf. M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996) (recognizing that when states provide for appellate review in quasi-criminal cases and parental rights termination cases, they must do so in a manner insuring that the avenues for appellate relief are free from "unreasoned distinctions that can impede open and equal access to the courts.").

[13]See, e.g., Christiansen, Bounds and Miller, *supra.*

entitles Menzies to relief under 60(b)(4), see Workman, *supra.*

The trial court was legally incorrect in ruling that (b)(4) only applies to denials of due process caused directly by the court (R. 3752), for many cases grant relief under 60(b)(4) as a result of due process denials stemming from inadequate performance by lawyers, rather than the courts (R. 3752).[14] Assuming *arguendo* that the court had to be at fault, the court's entering the default judgment orders without Menzies receiving notice or a hearing violated due process. E.g. Christiansen.

The court ruled that the default summary judgment was consistent with due process, because after Judge Uno entered the default summary judgment, Menzies "essentially" failed to comply with a lawful discovery order without a justifiable excuse (R. 3755).

The only discovery orders that were not complied with were those that entered prior to the default summary judgment (R. 1824-25, 1858-1958, 1959-64, 1965-2089, 2090-2102). Menzies' justifiable excuse for not complying with those orders was that he did not know about them until well after the sanctions and summary judgment were granted (R. 2307, R. 4126 at 166).

Just as the default judgment was void for lack of due process in Workman v. Nagle, *supra*, because the class action members were deprived of their day in court as a result of failure to follow the applicable procedural law, the default orders here were void for lack of due process because Menzies did not receive notice of them and did not have his day in court as a result of the violations of the relevant procedural laws discussed *infra.* Accordingly, he should be granted

---

[14]See, e.g., Workman, *supra*, (judgment void against class action members absent proof of adequate notice), and id. at n. 8 (citing cases where defective service required relief under 60(b)(4)).

relief under 60(b)(4). See Workman.

2. THE TRIAL COURT VIOLATED DUE PROCESS BY FAILING TO INITIALLY QUALIFY AND LATER REMOVE BRASS WHEN HE WAS CLEARLY PERFORMING IN SUBSTANDARD FASHION.

Contrary to the court's ruling (R. 3754), Menzies did argue that the trial court's failure to inquire into Brass's qualifications and failure to remove Brass, despite his obvious failures to perform as he should have, violated due process. See, e.g., R. 2339-2347.

When statutes set forth more specific procedural requirements than are set forth in Christiansen, *supra*, these requirements are also elements of due process.[15]

Utah Code Ann. § 78-35a-202 requires courts to appoint qualified counsel in capital post-conviction cases and Utah R. Crim. P. 8 (e) sets forth the qualifications lawyers must meet in order to represent someone in capital post-conviction proceedings. See id.

Judge Uno never assessed Brass' qualifications prior to appointing him.

Utah Admin. Code R. 25-14 requires appointed capital post-conviction lawyers to provide "all reasonable and necessary post-conviction legal services for the client." Id.[16] The Utah capital litigation scheme contemplates that when appointed counsel in capital cases perform improperly, the trial courts will remove them. See Utah Admin. Code R. 25-14-6.[17]

---

[15]Id. at 317. See also Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974) (recognizing a liberty interest cognizable under the Fourteenth Amendment's Due Process Clause based on a state law).

[16]Properly enacted administrative rules have the force and effect of law. See Utah Code Ann. § 63-46a-3.5(b).

[17]Compare Guideline 7.1 of the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty, *infra* (requiring agency to monitor appointed counsel and remove them when they are performing in substandard fashion, in light of the "unique and unalterable nature of the death penalty.").

In assessing what constitutes "all reasonable and necessary post-conviction legal services" in a capital post-conviction case, this Court should refer to the ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases,[18] which set the standards of objectively reasonable performance for capital trial counsel,[19] and also guide capital post-conviction lawyers. See id.

The guidelines require capital post-conviction lawyers to maintain contact with the clients and consult with them concerning the status of their cases. See Guideline 10.5.

Brass failed to send Menzies copies of the pleadings or apprize him accurately of the status of his case, rarely went to the prison to consult with Menzies, and he and his staff routinely hung up on Menzies or refused his calls from the prison (e.g. R. 2307, R. 4125 at 15, Exhibit 1, bates stamps 235-241, Exhibits 21 and 22, *passim*).

The guidelines require capital post-conviction lawyers to learn and stay abreast of the state and federal post-conviction law, to thoroughly investigate their client's trials, sentences, appeals and post-conviction cases, and to thoroughly litigate and preserve all claims in the trial courts and on appeal. See, id.

Brass did not understand the law governing state or federal post-conviction proceedings in capital cases, and did not understand the consequences of his failures to act in the state case

---

[18]The guidelines are found at: http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf. The guidelines and commentaries which are cited in this brief are copied in the addendum.

[19]Wiggins v. Smith, 123 S.Ct. 2527, 2536–37 (2003).

in subsequent federal and/or state post-conviction litigation (R. 2303, R. 4126 at 138, 150).[20]

Brass obviously was not investigating Menzies' case because he never submitted a request for payment or obtained district court approval of investigative fees, before or after filing the amended petition, as he should have under Utah Admin. Code R. 25-14-5.[21] There can be no claim that the court was free to assume that no investigation was required, in light Judge Uno's and the Utah legislature's provision of investigative funds, the ABA standards' requiring thorough investigation in post-conviction capital cases, the extended litigation by the *pro bono* lawyers seeking investigative funding and demonstrating that Menzies has uninvestigated claims of innocence (R. 4121 at 21, 32, 39, 50-51 39; R. 1031-1040), the affidavit of Corporon's investigator reflecting twenty-six areas of investigation omitted in LDA's grossly inadequate investigation (R. 1045-1060), and the affidavit of Ken Brown indicating that Menzies has uninvestigated claims of actual innocence and has never had a mitigation investigation (R. 1162-69).

In the 5 ½ years he had the case, the only documents Brass filed were the order appointing him and permitting his immediate withdrawal in the event of nonpayment (R. 1215-1216), the notice of appeal from the summary judgment (R. 2265), and the motion to set aside summary judgment (R. 2271).

Brass obviously did not file the two-page amended petition in timely fashion (R. 1231-32), did not attend to his discovery obligations (e.g. R. 4136 at 13; R. 2642-43, 1780-1805, 1883,

---

[20]But see, e.g., ABA Guidelines, 10.15.1, *supra,* and 8.1 (explaining the training that capital counsel must maintain to insure that counsel understand the dynamic complexities of state and federal capital post-conviction law).

[21]But see, e.g., ABA Guidelines, 10.15.1, and 10.7 and commentary (elucidating the duty to fully investigate capital cases).

1886-87), did not file the opposition to the deposition despite asking for time to do so (R. 4136 at 13), and did not respond to the State's motions to compel or for sanctions (R. 1824-25, 1858-1958, 1959-64, 1965-2089, 2090-2102), and thereby forfeited Menzies' right to present evidence in his defense, despite the fact that Judge Uno had repeatedly expressed a willingness to consider all of Menzies' claims, including those raised on direct appeal, to the extent that they involved ineffective assistance of trial and appellate counsel (R. 1696-97). Brass obviously did not respond to the summary judgment motion (R. 2106-2233, 2234-64), did not support the motion to set aside the summary judgment with a memorandum (R. 2271) and failed to perfect the appeal despite having received numerous opportunities to do so (see law and motion file in Case No. 2002-124-SC).[22]

Despite the obvious, glaring and repeated instances of grossly substandard performance by Brass, the court did not remove Brass from Menzies' case until well after the defaults entered and until well after Menzies informed the court that he had not been aware of the defaults when they entered, and sought relief and new counsel (R. 4129 at 9-10, R. 4128 at 4). But see, e.g., Utah Admin. Code R. 25-14-6.

This series of events and omissions violated Utah R. Crim. P. 8, Utah Code Ann. § 78-35a-202, Utah Admin. Code R. 25-14, the ABA guidelines, and due process of law.[23]

Because the default summary judgment order and other default orders were void for failure to comply with due process of law, this Court should require that the default orders be

---

[22]But see ABA Guidelines 10.15.1 and 10.8 and commentary (explaining the duty to assert all potential legal claims in capital cases).

[23]See id. See Christiansen, *supra*, (recognizing that when more specific statutes delineate governing procedures, these procedures are required by due process); Wolff, *supra* .

set aside under 60(b)(4).[24]

B. MENZIES IS ENTITLED TO RELIEF UNDER 60(b)(6).

1. BRASS'S GROSS NEGLIGENCE AND INEFFECTIVE ASSISTANCE ENTITLE MENZIES TO RELIEF.

To obtain relief under 60(b)(6), a party must allege a basis that is independent from those identified in subsections 1 through 5, which justifies relief, and must do so within a reasonable time.[25] Judge Brian found Menzies' motion for relief timely (R. 3727-3735). Denials of procedural due process of law, discussed *supra*, are recognized as a basis for relief under 60(b)(6), and thus qualify Menzies for relief.[26]

Incompetence of counsel also justifies relief under 60(b)(6).[27]

a. Statutory Right to Effective Assistance of Counsel

By virtue of the statute requiring the appointment of Brass, Utah Code Ann. § 78-35a-

---

[24]See, e.g., Richins v. Delbert Chipman & Sons, 817 P.2d 382, 385 (Utah App. 1991) (relief is mandatory under 60(b)(4) if a judgment is void for lack of due process) and Workman, *supra.*

[25]See, e.g., Richins v. Delbert Chipman & Sons, 817 P.2d 382 (Utah App. 1991).

The reason that the 60(b)(6) catch-all provision is an exclusive remedy is so that parties will not seek to evade the time limit of 60(b)(1) by proceeding under the residuary subsection. See Russell v. Martell, 681 P.2d 1193, 1195 (Utah 1984).

Because Brass's 60(b) motion was filed within three months of the summary judgment order, the motion met the time limit of 60(b)(1), and counsel for Menzies is not trying to evade any limits by arguing for relief under 60(b)(6). Rather, she is presenting multiple alternative claims for relief in an effort to obtain relief for Menzies under all legitimate sources of law.

[26]See Bish's Sheet Metal Co. v. Luras, 359 P.2d 21, 22 (Utah 1961) (dicta).

[27]See generally, Stewart v. Sullivan, 506 P.2d 74, 75-76 (Utah 1973) (recognizing that when party is not aware of progress of litigation by virtue of incapacitated counsel, this justifies relief). See also State ex rel. A.G., S.G., and L.G., 2001 UT App 87, ¶ 9, n.3, 27 P.3d 562 ("Rule 60(b) is 'sufficiently broad' to permit a court to set aside a judgment for ineffective assistance of counsel."(citation omitted).

202; and by virtue of Utah R. Crim. 8 and Utah Admin. Code R. 25-14-3,[28] Menzies was statutorily entitled to effective assistance of counsel.[29] These related provisions of the law evince a clear legislative recognition that death penalty cases involving indigent criminal defendants, like parental rights termination cases, are fundamentally different from ordinary civil cases. Cf. T.S., at ¶ 6. These provisions of law expressly require appointed counsel to not only qualify, but also, "provide all reasonable and necessary post-conviction legal services for the client" in capital post-conviction cases, § 78-35a-202, and thus indicate that counsel appointed to represent capital post-conviction petitioners must be effective. Cf. T.S. at ¶ 7.

This Court should give full effect to the Legislature's expressed and implicit intent to provide effective assistance in capital post-conviction cases involving indigent defendants, and should interpret court rule 60(b), which, like rule 4(e), provides a mechanism for relief from technical errors, in a manner that promotes the Legislature's goal of providing effective assistance in capital post-conviction cases. Cf. T.S., ¶ 8.

> [W]here the right at issue is a right to counsel which has been statutorily created and judicially affirmed, [this Court] will not prevent a claimant from having [his] day in court due to the professional infirmity of [his] lawyer and a parsimonious application of an exception to a rule of procedure. To do otherwise, that is, to hold [Menzies] accountable for [his] lawyer's negligence, where [he] is statutorily entitled to appointed counsel, impermissibly undermines [his] right to counsel.

T.S., ¶ 11.

b. Constitutional Rights to Effective Assistance of Counsel

---

[28]Properly enacted administrative rules have the force and effect of law. See Utah Code Ann. § 63-46a-3.5(b).

[29]See, T.S. v. State, 2003 UT 54, ¶¶ 6-11, 82 P.3d 1104 (legislature's mandate for appointment of counsel in parental rights termination cases contemplated mandate for effective assistance of counsel).

i. State Constitutional Rights to Effective Assistance of Counsel

The right to effective assistance of counsel is broadly supported by many provisions of the state constitution. Article I § 7 of the Utah Constitution establishes the right to counsel as an element of due process in cases wherein life or liberty are at stake.[30] This section has been recognized as guaranteeing the right to effective assistance of counsel,[31] and has been interpreted by this Court as providing greater protection than the federal constitution in the context of eyewitness identification instructions, to improve the reliability of criminal trials and convictions.[32] Requiring effective assistance of counsel in state capital post-conviction proceedings would surely serve the interest of testing the reliability of criminal convictions and sentences in capital cases, and would thus be entirely consistent with Article I § 7. Cf. id.

Article I § 5, which is specifically designed to insure the enduring effectiveness of the writ of habeas corpus, would also sustain a requirement of effective assistance of counsel in capital post-conviction cases, because effective lawyering is required in this highly adversarial context.[33]

Article I § 11, the open courts provision, is often linked to the Utah Due Process Clause, and expressly recognizes the right of access to the courts, and would also be a natural underpinning of the right to effective assistance of counsel in these cases. "The clear language of [this provision] guarantees access to the courts and a judicial procedure that is based on

---

[30]Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945).

[31]See State v. Maestas, 1999 UT 32 ¶ 1, 984 P.2d 376.

[32]See State v. Ramirez, 817 P.2d 774 (Utah 1991).

[33]See Julian v. State, 966 P.2d 249, 253 (Utah 1998) (recognizing the writ as the greatest protector of individual liberty, as requiring the Courts to "maintain their fundamental power to "guarantee fairness and equity in particular cases.").

fairness and equality."[34]"At a minimum, a day in court means each party shall be afforded the opportunity to present claims and defenses, and have them adjudicated on the merits according to the facts and the law."[35] Given the complicated procedural and substantive lawyering that is required in capital post-conviction cases, effective assistance of counsel is realistically recognized as a prerequisite to meaningful access to the courts. See ABA guidelines, *supra.*

Constitution of Utah, Article I § 12 would also be a basis for requiring effective assistance of counsel in this capital state post-conviction case, given that it guarantees the right to counsel and the right to an appeal in criminal cases, and because the state post-conviction case is the first meaningful opportunity Menzies has had to challenge or appeal from his trial on the basis of ineffective assistance of counsel.[36]

ii. Federal Constitutional Rights to Effective Assistance of Counsel

In Coleman v. Thompson, 501 U.S. 722 (1991), the Court noted the general law that there is no constitutional right to counsel in post-conviction proceedings, but then recognized that there may be an exception in cases wherein post-conviction petitioners have no opportunity to raise ineffective assistance claims in their direct appeals. Id. at 755.

In Menzies' trial and direct appeal, he was represented by LDA. Consistent with the law at that time, which required criminal defendants to raise claims of ineffective assistance of counsel in post-conviction proceedings and only permitted claims of ineffective assistance on direct appeal when new counsel appeared and the record contained sufficiently developed facts

---

[34]Berry v. Beech Aircraft Corp., 717 P.2d 670, 675 (Utah 1985).

[35]Miller v. USAA Cas. Ins. Co., 44 P.3d 674-75 (Utah 2002).

[36]Cf. e.g., Coleman v. Thompson, 501 U.S. 722, 755 (1991), *infra.*

to sustain the claim,[37] LDA did not allege ineffective assistance of counsel.

Under the exception discussed in Coleman, because Menzies could not have brought his ineffective assistance of counsel claims to challenge his convictions until he reached the post-conviction proceedings, Menzies was and is entitled to effective assistance of counsel by his post-conviction lawyers under the Fourteenth Amendment and the principles of equality embodied therein. See Coleman, *supra.*

In assessing whether Menzies' right to effective assistance of counsel was violated in the instant matter, the Court should rely on the Sixth Amendment line of cases such as Strickland and several other federal constitutional provisions which are fairly read as recognizing the right in this context, including the Fourteenth Amendment's due process and/or equal protection guarantees, or on the Eighth Amendment. See Coleman, *supra*; Wolff v. McDonnell, 418 U.S. 539, 556-58 (1974) (recognizing a liberty interest cognizable under the Fourteenth Amendment's due process clause based on a state law); Evitts v. Lucey, 469 U.S. 387, 396 (1985) (equal protection requires effective assistance of counsel on first appeal of right); Bounds v. Smith, 430 U.S. 817, 821-28 (1977) (*plurality*) (states must provide legal assistance so defendants have "adequate, effective and meaningful" access to the courts). Cf. Murray v. Giarratano, 492 U.S. 1, 14-15 (1989) (*plurality*) (Kennedy, concurring) (recognizing unsettled question regarding the extent of assistance states must provide indigent state death row prisoners challenging their convictions or death sentences in post-conviction proceedings in capital cases); 14-32 (Stevens, Marshall, Brennan, Blackmun, dissenting) (arguing that Eighth and Fourteenth Amendments require states to provide appointed counsel to indigent capital defendants in state post-

[37]See, e.g., State v. Humphries, 818 P.2d 1027, 1029 (Utah 1991).

conviction).

c. Assessing Brass's Ineffective Assistance

In making constitutional claims of ineffective assistance of counsel, litigants are normally required to show that counsel performed in an objectively deficient manner that was prejudicial in resulting an unreliable or fundamentally unfair outcome, or that absent the objectively deficient performance of counsel, there is a reasonable likelihood of a different result.[38] The same standard applies in cases of statutory ineffective assistance.[39]

As the trial court's ruling essentially finds (R. 3736-3738 and n.3), and as is discussed above, in the course of defaulting away all of Menzies' state habeas rights, Brass performed in an objectively deficient manner.[40]

To show prejudice, the client must show a reasonable probability of a different result in the absence of counsel's errors, depending on the result challenged. Strickland at 695-96. Where the results Menzies challenges are default orders, which resulted in Menzies' inability to develop and present evidence in support of his claims, it appears that the prejudice Menzies would normally be required to show would be a reasonable probability that the default orders would not have entered absent the ineffective assistance of Brass. See id.[41]

---

[38]See, e.g., Strickland v. Washington, 466 U.S. 668, 687 (1984).

[39]See State ex rel. E.H. v. A.H., 880 P.2d 11, 13 (Utah App. 1994). See also Strickland, 466 U.S. at 686-87 and at 697-98.

[40]See, e.g., Utah R. Crim. P. 8, Utah Code Ann. § 78-35a-202, Utah Admin. Code R. 25-14, and the ABA Guidelines, *supra.*

[41]See also Hill v. Lockhart, 474 U.S. 52, 59 (1985) (petitioner raising ineffective assistance in challenging a guilty plea establishes prejudice by proving that in the absence of counsel's conduct, there is a reasonable likelihood that he would not have pled guilty); Roe v. Florez-Ortega, 528 U.S. 470, 483-84 (2000) (petitioner raising ineffective assistance in

While Menzies is able to make such a showing because he has always asked his post-conviction lawyers to pursue his case and did not give them permission to abandon any claims (e.g. 2306-07), because Brass's defaults were so egregious and comprehensive that he failed to provide any meaningful representation, Menzies should be relieved of his burden to prove prejudice of any kind. For in cases involving the constructive denial of counsel, as this one does, courts presume prejudice. See Strickland at 692.[42]

Whether Brass's misconduct is characterized as ineffective assistance or gross negligence, because the entry of the default rulings was the direct result of Brass's misconduct and in violation of fundamental precepts of due process of law, this Court should order relief from those rulings under 60(b)(4), or under 60(b)(6). See, e.g., Richins, *supra*.[43]

2. THE ENTRY OF THE DEFAULT RULINGS VIOLATED MENZIES' CONSTITUTIONAL RIGHTS TO HABEAS CORPUS, EQUAL PROTECTION AND UNIFORM OPERATION OF LAWS.

---

challenging the failure to appeal establishes prejudice by proving a reasonable likelihood that he would have appealed in the absence of counsel's deficient performance).

[42]See also Roe v. Florez-Ortega, 528 U.S. 470, 483 (2000) (in finding a lawyer's failure to file a notice of appeal was presumptively prejudicial, the Court held that where counsel's conduct does not just deprive a person of a fair judicial proceeding, but forfeits the proceeding altogether, prejudice is presumed). Cf. United States v. Cronic, 466 U.S. 684, 689 (1984) (adversarial process becomes presumptively unreliable when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing."); United States v. Snitz, 342 F.3d 1154, 1155-56 (10th Cir. 2003) (citing cases for the proposition that "The Supreme Court has recognized repeatedly over the last thirty years that a lawyer who disregards specific instructions to perfect a criminal appeal acts in a manner that is both professionally unreasonable and presumptively prejudicial.").

[43]Community Dental Services v. Tani, 282 F.3d 1164, 1171 (9th Cir. 2002) (when attorney failed to obey court orders and failed to oppose motions and otherwise defaulted, court recognized that client received "almost no representation at all" and that gross negligence of attorney justified relief under the catch-all subsection of federal rule 60(b)); and L.P. Steurt Inc. v. Matthews, 329 F.2d 234 (D.C. Cir.) (client entitled to relief under catch-all of federal rule 60(b), because case defaulted as a result of counsel's gross neglect of the case and misleading of the client), cert. denied, 379 U.S. 824 (1964).

Article I § 5 of the Constitution of Utah provides, "The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it." Our courts' broad authority to issue writs to secure due process of law and justice to those who have been deprived thereof has been a state and federal constitutional basic for many years.[44] The open courts provision, Constitution of Utah, Article I § 11, and the separation of powers provision of the Utah Constitution, Constitution of Utah, Article V § 1, both guarantee "a judicial department armed with process sufficient to fulfill its role as the third branch of government," and require the courts to jealously guard their habeas powers. Hurst.

"One of the principle functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted."[45] Courts recognize that the writ must be available to correct significant constitutional errors, to insure the reliability of convictions.[46] Avoiding the execution of an innocent person is at the core of habeas corpus jurisprudence.[47] Habeas review is critically important in capital cases, wherein both the conviction and the sentence must be reliable.[48]

---

[44]See, e.g., Hurst v. Cook, 777 P.2d 1029, 1033 (Utah 1989) (discussing historical importance of writ in securing justice for those deprived of due process of law).

[45]Bousley v. United States, 523 U.S. 614, 620 (1998).

[46]See, e.g., O'Neal v. McAninch, 513 U.S. 432, 442 (1995).

[47]See Schlup v. Delo, 513 U.S. 298, 324-25, 326 and n.42 (1995).

[48]See, e.g., McFarland v. Scott, 512 U.S. 849, 859 (1994), and studies by Liebman, J.S., "A Broken System, Error Rates in Capital Cases," and "A Broken System II: Why There is So Much Error in Capital Cases, Questions and Answers."

The Liebman studies are statistical analyses of 5,760 cases, all cases in our state and federal courts between 1973 and 1995 wherein the death penalty was given. The studies found that prejudicial error occurred in sixty-eight percent (68%) of those death penalty cases. State courts found prejudicial error in forty-seven percent (47%) of the cases, and subsequent federal review of the remaining cases found reversible error in forty percent (40%) of the cases that had withstood state court review. Of the cases wherein death sentences were vacated in state post-conviction proceedings, the Liebman studies found that eighty-two percent (82%) of the defendants were given sentences less than death, and that

Habeas review is critically important in state courts in capital cases, as these proceedings are expected to provide all fact-finding procedures necessary to afford a "full and fair" hearing on any disputed and controlling factual issues.[49] When petitioners default federal constitutional issues in state habeas, the doctrine of procedural bar generally forecloses relief in the federal courts. See, e.g., Coleman v. Thompson, 501 U.S. 722, 750.

The default orders in this case effectively circumvented Menzies' right to habeas corpus in state court, and if uncorrected, will likely continue to bar him from seeking habeas relief in state or federal court, and foreclose judicial review and testing of the reliability of the convictions and sentence. See, e.g., Coleman, *supra.*

Article I §§ 2 and 24, and Article VI § 26 of the Utah Constitution thrice recognize everyone's right to be treated in a fair and evenhanded manner by the law. The Equal Protection Clause of the Fourteenth Amendment provides similar, albeit lesser protection.[50] The cardinal rule of Article I § 24 is that "a law must apply equally to all persons within a class." Wood at ¶ 34.

By virtue of the default orders and the ruling denying him relief therefrom, Menzies is

---

between seven and nine percent (7-9%) of the defendants were found to be not guilty after retrial. The studies found that the majority of the prejudicial errors in these capital cases related to incompetent counsel who failed to find or assert evidence of innocence or evidence indicating that the death penalty was not lawful, prosecutorial or police misconduct, or misinformed or biased jurors or judges, claims raised in Menzies' case. See id.

The studies may be found at
http://www2.law.columbia.edu/instructionalservices/liebman/ and
http://www2.law.columbia.edu/brokensystemt2/ on the internet.

The Liebman studies demonstrate that death penalty cases most often do involve prejudicial, reversible error, and why it is critical that Menzies' and all death penalty cases receive full judicial review in state habeas. See id.

[49]Keeney v. Tamayo-Reyes, 504 U.S. 1, 10 (1992).

[50]See, e.g., Wood v. University of Utah Medical Center, 2002 UT 134, ¶¶ 33-34, 67 P.3d 436 (recognizing that state constitution requires that all laws apply uniformly to similarly situated people, and that the federal constitution requires laws to apply in similar fashion to similarly situated individuals).

receiving a radically different application of the laws than all other indigent capital defendants who would normally have access to the state and federal courts for full and fair adjudication of their claims, and the default orders thus entered in violation of Menzies' state and federal rights to equal protection and uniform operation of laws. See id.

Because no other subsection of Rule 60(b) applies to habeas corpus, equal protection or uniform operation violations, this Court should grant Menzies relief under 60(b)(6) for these constitutional violations.[51]

C. MENZIES IS ENTITLED TO RELIEF UNDER 60(b)(1).

To obtain relief under 60(b)(1), a party must show that the judgment was the result of mistake, inadvertence, surprise, or excusable neglect, that the motion for relief from judgment was timely, and that the case involves a meritorious defense or an issue worthy of adjudication.[52] Judge Brian found Menzies' motion for relief timely (R. 3727-3735).

The court ruled that Menzies was not entitled to relief under 60(b)(1), because Brass's ineffective representation of Menzies was not mistaken or excusable or based on a reasonable good faith misinterpretation of the law, but appeared to be willful and deliberate gross negligence (R. 3722-3723, 3735-3738 and n.3).

This Court should reach the argument made by Menzies, that he should be excused for his mistaken reliance on Ed Brass to litigate his case. See, e.g., R. 2328-2335. Clients who rely

---

[51]Cf. Richins, *supra*, (courts grant relief under 60(b)(6) for justifiable reasons not identified in other subsections of 60(b)) .

[52]See State by & through Utah State Dep't of Social Servs. v. Musselman, 667 P.2d 1053, 1055-56 (Utah 1983).

on counsel who fail to perform are entitled to relief under 60(b)(1).[53]

Because Menzies mistakenly relied on Brass to provide the legal representation to which Menzies was clearly entitled,[54] and because Menzies' reasonable reliance on Brass, his lack of legal training and Rule 8 qualifications, and his status as a death row inmate[55] explain his inability to litigate his state post-conviction case himself, he qualifies for relief under 60(b)(1). See Interstate Excavating, *supra.* Menzies is entitled to relief because the defaults did not involve Menzies' deliberate, counseled decisions, but were mistakes he could not protect against, because Brass defaulted Menzies' case without authority.[56]

Menzies has meritorious claims. For instance, his two amended petitions identify numerous claims, which, if proved, would prevent the State from executing him (R. 44-81, 1231-32), and entitle Menzies to relief under 60(b)(1).[57]

D. MENZIES IS ENTITLED TO RELIEF UNDER 60(b)(5).

---

[53]See, e.g., Stewart, *supra*, Lincoln Ben. Life Ins. Co. v. D.T. Southern Properties, 838 P.2d 672, 674 (Utah App. 1992) (mistaken reliance on attorney fell within ambit of 60(b)(1)); Interstate Excavating Inc. v. Agla Development Corp., 611 P.2d 369 (Utah 1980) (trial court should have granted relief under 60(b)(1) after learning that default entered because defendant's lawyer did not give him notice of trial date and withdrew, and upon learning this, defendant immediately sought relief).

[54]See, e.g., Utah Code Ann. § 78-35a-202, Utah R. Crim. P. 8.

[55]Menzies has limited access to telephones, and has no law library, clerk, paralegal, legal assistant, or prison contract lawyer for his post-conviction case (R. 2634-35; R. 4125 at 56, 108, R. 4126 at 174).

[56]See Yapp v. Excel Corp., 186 F.3d 1222, 1231 (10th Cir. 1999) (60(b)(1) relief is appropriate for "litigation mistakes that a party could not have protected against, such as counsel acting without authority.") (citations omitted).

[57]See Lund v. Brown, 11 P.3d 277, 273, 2000 UT 75 at ¶ 29 (to show a meritorious or non-frivolous defense, a party must make "a clear and specific proffer of a defense that, if proven, would preclude total or partial recovery" by the opposing side.)

In considering granting relief under 60(b)(5), because "it is no longer equitable that the judgment should have prospective application," the Court is to analyze "whether the judgment has prospective application and whether subsequent events have occurred making enforcement of the judgment's prospective application no longer equitable." Richins, 817 P.2d at 386.

The default orders compelling Brass to fulfill his discovery obligations and the sanctions order which resulted from his failures and preceded the summary judgment order both had prospective effect, in first requiring performance by Brass, and then forbidding Menzies to present additional evidence to support his claims of innocence and ineffective assistance of LDA (e.g. R. 2102).[58]

The summary judgment order in this case also forbids Menzies to present evidence (e.g. R. 2244 and 2246) and also has additional prospective application, in that it bars him from proceeding with his state habeas case, and will likely bar Menzies from seeking relief from the errors alleged in the state post-conviction petitions in the federal or state courts.[59] Because these orders control the future conduct of Menzies and forbid him to act, they have prospective application. See id.

Some of the events relied on to obtain relief from the summary judgment and other default orders occurred subsequent to the entry of those orders, including Brass's failure to accurately inform Menzies of his defaults and repeatedly misleading Menzies regarding the nature of the defaults and to believe that he was curing the default summary judgment (Exhibits

---

[58]See, e.g., Twelve John Does v. District of Columbia, 841 F.2d 1133, 1138 (D.C. Cir. 1988)(order is prospective if it compels a party to perform or not to perform a future act).

[59]See, e.g., Utah Code Ann. § 78-35a-106 (1)(d) and Coleman v. Thompson, 501 U.S. 722, 750 (1991), *supra.*

17 and 20, R. 4125 at 95-99, R. 4126 at 166-68, 197, 203, Exhibit 21, January 23, 2003 and March 5, 2003 entries), and establish that it would be inequitable for the default orders to have prospective effect. See Richins, *supra.*

Because it would be inequitable to permit the default summary judgment and other default orders to foreclose Menzies' access to the courts in the future, this Court should require relief from the default orders under 60(b)(5). See Richins, *supra.*

II.
THE COURT ERRED IN HOLDING MENZIES RESPONSIBLE FOR BRASS'S DEFAULTS.

The court ruled that Menzies should not be held accountable for Brass's conduct under the attorney-client agency theory,[60] because Menzies is a death row inmate and did not choose or hire Brass, who was appointed by the court to represent Menzies (R. 3739-41).[61] The court's rejection of the lawyer-client agency rule in this was correct, because indigent capital post-

---

[60]Ordinary civil litigants are often saddled with the consequences of their lawyers' negligence, because they choose, employ and dismiss their lawyers at will, and are responsible to supervise the lawyers, who are considered their agents. See, e.g., Pioneer Services Inv. Co. v. Brunswick Assoc. Ltd. Partnership, 507 U.S. 380, 396-97 (1993).

[61]The court cited Franklin v. Lopez, 1999 U.S. Dist. LEXIS 6550, * 5 (N.D. Ill. 1999) for the proposition that "'[Petitioner] may have an argument that this [agency] rule should not apply in the case of misconduct by a court-appointed attorney. In such cases, the client has not chosen the attorney, negating a primary rationale for holding parties strictly liable for their attorney's mistakes.'" (R. 3740).

The court reasoned that the appointment of lawyers for indigent death row inmates is a matter of judicial discretion, and noted that in T.S. v. State, 2003 UT 54 ¶ 11, 82 P.3d 1104, this Court held that "'to hold [a client] accountable for her lawyer's negligence, where she is statutorily entitled to appointed counsel, impermissibly undermines her right to counsel.'" (R. 3740-41).

conviction petitioners with appointed counsel may not hire and fire them at will[62] and thus lack the leverage attendant to a normal employer-employee relationship. Appointed counsel in capital post-conviction cases are largely immune from suit, Utah Code Ann. § 77-32-308, and capital post-conviction clients cannot sue their appointed lawyers to retrieve their lives, in any event. Public concerns about the judicial system's protecting its own (the lawyers) at the expense of the litigants are not ameliorated by the remedy of malpractice litigation here.[63]

Despite recognizing that Menzies cannot be fairly held liable for Brass's defaults, the court nonetheless ultimately held Menzies responsible for Brass's defaults, and refused relief under subsections 1 and 6 of Rule 60(b), as a purported consequence of Menzies' failure to dismiss Brass as his lawyer and "immediately and repeatedly contact the court." (R. 3749-51, 3769).

A. THE TRIAL COURT'S LEGAL RULE TRANSLATING MENZIES' FAILURE TO DISMISS BRASS INTO AN ACCIDENTAL WAIVER OF FUNDAMENTAL RIGHTS IS LEGALLY INCORRECT.

The ruling holding Menzies liable for his attorney's defaults, whether directly under the civil lawyer-client agency theory, or indirectly, under the failure to dismiss counsel theory (which is essentially the same thing), despite the fact that Menzies did not even know about the defaults, is refuted by reference to basic constitutional law.

Presuming waiver of a fundamental right from inaction, is inconsistent with this

---

[62]See, e.g., State ex rel R.H., 2003 UT App 154 at ¶ 13, 71 P.3d 616, 620 (citing cases to the effect); Utah Code Ann. § 78-35a-202.

[63]Compare Inryco v. Metropolitan Engineering Co., 708 F.2d 1225, 1235 (7th Cir. 1983) (concerns that holding clients responsible for their lawyer's misconduct will undermine public confidence in the judicial system are mollified by the litigants' ability to sue the offending lawyers for malpractice).

> Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as 'an intentional relinquishment or abandonment of a known right or privilege.' Courts should 'indulge every reasonable presumption against waiver,' , and they should 'not presume acquiescence in the loss of fundamental rights,' ...
>
> > 'Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandably rejected the offer. Anything less is not waiver.'
>
> The Court has ruled similarly with respect to waiver of other rights designed to protect the accused.

Barker v. Wingo, 407 U.S. 516, 525-26 (1972), (footnote and citations omitted).[64]

Accordingly, the Post-Conviction Remedies Act appointment statute requires courts to make a record of a capital defendant's waiver of counsel after first being advised on the record of the rights he is waiving. See Utah Code Ann. § 78-35a-202(2)(b).

Given the fundamental requirements of knowing, intelligent record waivers of fundamental constitutional and other rights to competent counsel, habeas relief, access to the courts, due process of law, equal protection and uniform operation of laws, and to appeal, the trial court's order, which gives Menzies' failure to contact the court and dismiss Brass the effect of an accidental waiver of these rights, cannot stand. See e.g. Wingo, 78-35a-202, *supra*.[65]

---

[64]See also Chess v. Smith, 617 P.2d 341, 344 (Utah 1980) (in holding that when client is tried in inmate garb, and there is no waiver of the right not to on the record, this constitutes structural error, the Court explained, "When fundamental clear-cut rights are at stake, the waiver of which is not likely to advance any strategy, proper protection of basic constitutional rights and the more effective administration of justice are advanced when the trial judge undertakes to determine whether the defendant, himself, wishes to waive his rights.").

[65]See also, e.g., Faretta v. California, 422 U.S. 806, 835 (1975) (requiring detailed on-the-record colloquy prior to waiver of right to counsel in criminal trial); Utah Code Ann. § 78-35a-202, *supra* (requiring on the record waiver of counsel in indigent capital post-conviction cases).

The standards which apply to a case turn on the nature of the result of the litigation.[66] All the cases the court relied on in holding Menzies liable for Brass's defaults are ordinary, non-habeas civil cases which do not involve life or liberty (see R. 3741-44 and n.3, 3761-63), which do not control in a quasi-criminal capital case such as this.[67]

Particularly given the ultimate stake involved in a capital case, applying the non-habeas civil cases to impose a duty on a death row inmate to second-guess his lawyer is not permissible, because of the need for reliability of convictions and full judicial review in this context. See Liebman studies, *supra*, and O'Neal v. McAninch, 513 U.S. 432 (1995).

In O'Neal, the Court held that if a federal judge presiding over a habeas case is in grave doubt that a constitutional error in a state criminal proceeding was not harmless, the petitioner must prevail. Id. at 436. The Court rejected the state's contention that a habeas petitioner, as a civil litigant, bore the burden of proof of prejudice, because the stakes involved in a habeas case are someone's custody and liberty and not mere civil liability. The Court held that in cases involving those high stakes, the Court had consistently required relief when there are grave doubts about harmlessness of an error. Id. at 440. The Court rested its decision in part on the "basic purposes underlying the writ of habeas corpus," the need to correct constitutional errors which risk "an unreliable trial outcome and the consequent conviction of an innocent person,"

---

[66]See, e.g., Sims v. Collection Div. of the Utah State Tax Com'n, 841 P.2d 6, 13 (Utah 1992) (opinion of Durham, J.., concurred in by Zimmerman, J.) ("Because of the difference in potential penalties, the criminal defendant is often afforded greater protection than the civil defendant. Where the aims and objectives of a civil penalty are closely aligned with those of the criminal law, however, the protections afforded by the criminal law ought to be extended to the quasi-criminal proceeding.").

[67]See O'Brien v. Moore, 395 F.3d 499, 504-507 (4th Cir. 2005) (surveying federal decisions regarding the hybrid nature of habeas cases). Cf. e.g., Sims, *supra*.

and the need to "guarantee the integrity of the criminal process by assuring that trials are fundamentally fair." Id. at 442.

Particularly given the nature of the penalty at stake in capital post-conviction cases – death by execution – and given the extreme complexity of capital post-conviction litigation and need for thorough judicial review, this Court should not apply the line of non-habeas civil cases holding litigants liable for their attorneys' negligence in this context. Cf. id.

The trial court's ruling putting the burden on Menzies to monitor his case and to question his appointed lawyer's performance is flatly at legal odds with the Utah legislative scheme for indigent capital post-conviction cases, which puts the burden squarely on the shoulders of the trial courts to appoint qualified lawyers and to remove appointed lawyers who are not functioning as they should. See Utah Code Ann. § 78-35a-202; Utah R. Crim. P. 8, Utah Admin. Code 25-14-6.

The Utah Legislature's choice in this regard is a wise one, given that death row inmates have limited access to the outside world, the courts, and the mental, financial and educational resources and expertise necessary to monitor, assess or litigate these cases.[68] As this case demonstrates, the courts, and prosecutors who may file disqualification motions,[69] are in a far

---

[68]Compare Utah R. Crim. P. 8(e) and ABA Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases with Death Penalty Information Center pages on Mental Illness and the Death Penalty, on Mental Retardation and the Death Penalty (providing reference materials on the prevalence of mental illness and retardation among death row inmates), and on Time on Death Row (detailing death row conditions and the effects of the conditions on the inmates). These pages are found on the internet at http://www.deathpenaltyinfo.org/article.php?did=782&scid=66, http://www.deathpenaltyinfo.org/article.php?scid=28&did=176, and http://www.deathpenaltyinfo.org/article.php?&did=1397.

[69]See, e.g., State v. Arguelles, 2003 UT 1, 63 P.3d 731.

better position than death row inmates are to recognize the need and take action to remove offending appointed lawyers. See Point IIB, *infra.*

It would be particularly unfair to impose a duty to independently monitor and assess the status of a capital post-conviction on a petitioner with appointed counsel, for only specifically qualified attorneys are allowed to represent indigent defendants in this complex area of the law, and the statutory appointment procedures in these cases give the petitioners the impression that they have a right to rely on their specially qualified lawyers.[70]

The trial court's ruling that death row inmates should "immediately and repeatedly contact the courts" when they have concerns about their case or their lawyers' performance (R. 3749-51), conflicts with sound and standard practice, wherein trial courts routinely forbid represented people to communicate directly with the courts, and require them to go through their appointed lawyers.[71] Imposing a duty on indigent capital post-conviction petitioners to maintain contact with the courts regarding the status of their cases and what must be done to litigate them would impose significant burdens on the courts' staff members, who may not be law-trained, or in a position to accurately inform the petitioners regarding the status of the case and which matters require which actions.[72] Courts and their staff are normally to avoid *ex parte*

---

[70]See, e.g., Utah R. Crim. P. 8 (requiring courts to make findings of specific qualifications during the appointment of counsel in capital cases) and Utah Code Ann. § 78-35a-202 (requiring courts to notify petitioners of their right to counsel).

[71]See, e.g., Olam v. Congress Mortgage Company, 68 F.Supp.2d 1110, 1117 (N.D. Cal. 1999).

[72]Cf. Martinez v. Court of Appeal of California, Fourth Appellate Dist., 528 U.S. 152, 163 (2000) (in holding that the federal constitutional right to self-representation does not extend to appeals, the Court recognized that representation by "trained counsel" benefits the client and the courts, and serves the interest in the fair and efficient administration of justice).

communications,[73] which communications would certainly be a likely risk of requiring represented capital post-conviction petitioners to maintain contact with the courts concerning the status of and needed actions in their cases.

It would be fundamentally unfair to penalize Menzies with forfeiture of his rights to seek relief from his convictions and death sentences in the state and federal courts on the basis of Brass's inactions, of which Menzies was unaware, particularly when the court had a duty to monitor Brass's performance and where the court and the State must have known that Brass was performing in a grossly negligent fashion, but did nothing to determine whether Menzies, who had consistently asserted his innocence and rights before Brass took the case and during the few hearings and the depositions which occurred after Brass took the case, intended to default his rights away.[74]

Accordingly, this Court should correct the trial court's legal error in applying the non-habeas civil waiver standard to find that Menzies accidentally waived his constitutional rights to seek relief from his capital conviction and sentence by failing to dismiss his lawyer and immediately and repeatedly contact the court. See O'Neal, *supra.*

B. THE COURT'S HOLDING MENZIES RESPONSIBLE FOR BRASS'S DEFAULTS HINGES ON INADEQUATE AND CLEARLY ERRONEOUS FINDINGS OF FACT.

The most egregious omission in the trial court's findings is the trial court's failure to recognize that Brass delayed informing Menzies of the defaults, did not fully inform Menzies of

---

See also Utah R. Crim. P. 8 (e) and ABA Guidelines, *supra.*

[73]See Utah Code of Judicial Conduct, Canon 3(B)(7) and (C)(3).

[74]Cf, e.g., Christiansen v. Harris, 163 P.2d 314, 316-17 (Utah 1945) (federal and state due process guarantees require notice).

the nature or extent of the defaults, and misled Menzies to believe that Brass was curing the defaulted summary judgment.[75]

The court found:

> In a January 23, 2002 journal entry, Petitioner indicates that Mr. Brass told him that the trial court had granted the State's motion for summary judgment, but that he should not worry because there was a discovery stay in place.

(R. 3748 n.9).

This finding is clearly erroneous in indicating that the journal reflects that Brass told Menzies that the summary judgment had been granted on January 23, 2002, and there is no evidence to marshall in support of it. The journal entry states:

> January 23, 2002
> Called Ed Brass's office with Mike Archuleta. We both actually spoke with Ed. Ed told me that he was bringing Amy D. out to see me on the 30th or 31st while he was seeing Archie. He was going to see me also. He told me to call Amy D. on the 24th to get the details. He also said that the State was trying to get a summary judgment against me. Ed said it was for failure to prosecute our writ but not to worry as it was the state's fault as they had a stay for discovery. I asked him how the State could ask for a summary judgment when it was their stay & he

---

[75]Many 60(b) cases turn heavily on whether a lawyer misled the client. Compare L.P. Steuart, Inc. v. Matthews, 329 F.2d 234, 235 (D.C. Cir. 1964) (court affirmed granting of 60(b) relief in personal injury case because lawyer grossly neglected the case and misled the client to believe he was attending to it); and Community Dental Services v. Tani, 282 F.3d 1164, 1170 (9th Cir. 2002)(court reversed denial of 60(b) relief in a trademark case involving a dental practice, because the lawyer essentially provided no representation at all, thus vitiating the agency relationship, and misled the client to believe he was litigating the case properly, and because there was no evidence that client was at fault); with Inryco v. Metropolitan Engineering Co., 708 F.2d 1225, 1234 (7th Cir. 1983) (court affirmed denial of 60(b) relief in contract case, because company failed to inquire of lawyer or court regarding status of case, and lawyer did not mislead the company regarding status of case); United States v. Cirami, 535 F.2d 736 (2nd Cir. 1976) (court affirmed denial of 60(b) relief in tax case, because Cirami was an experienced businessman who was familiar with IRS procedures, and who offered no proof of efforts to ascertain the status of his case, and no proof that the attorney misled him).

said "exactly," not to worry. I like Ed and he is an awesome attorney. (Go Ed!!!)

The court's error is key, because, rather than showing that Menzies knew the summary judgment had been granted by January 23, 2002, the journal entry actually shows that Brass was misleading Menzies to believe that the State was futilely trying to obtain summary judgment for failure to prosecute the writ when the State was not in a position to do so, having obtained a discovery stay, when in fact the State had already obtained summary judgment in a ruling announced on December 7, 2001 (R. 2234-35) and finalized on January 11, 2002 (R. 2234-2264), for Brass's failure to comply with his discovery duties.

The trial court's findings do not mention Brass's letter written on December 30, 2002, which states:

> Dear Ralph:
>
> The Attorney General's office has managed to obtain a summary judgment in your writ based upon our alleged failure to comply with certain discovery requests on their part. This is my responsibility and not yours. I am doing what is necessary to have it set aside. However, if this should cause you to lose any faith in me, I would not blame you. You should let me know, by writing me a letter, what your desires are with respect to this matter.
>
> If you would like to discuss this by telephone, you can call my secretary who will accept your call and then schedule a time when the phone is available to you and when I will be in the office.
>
> Sincerely,
> /s/
> Edward K. Brass

This letter was misleading because it was written over a year after the summary judgment was initially announced on December 7, 2001 (R. 2234-35), and nearly a year after it entered on January 11, 2002 (R. 4125 at 93), and because Brass was not doing what was necessary to have the default summary judgment set aside, but instead had twice defaulted on the appeal from

summary judgment, and had not filed anything in support of the motion to set aside.

The court found:

> In letters to Mr. Brass dated September 24, 1998, September 9, 1999, and January 2, 2003, Petitioner complains about his inability to contact Mr. Brass and expresses frustration with the progress of his case.

(R. 3747).

That summary is severely incomplete, particularly with regard to the January 2, 2003 letter, which is the one Menzies wrote to Brass after Brass partially informed him of the summary judgment nearly a year after the fact. In this reply letter to Brass, Menzies reiterated his continuing faith in Brass's ability to take the necessary steps to have the summary judgment set aside, and asked Brass to fight for him (Exhibit 17). He also documented that on January 23 of 2002, Brass spoke with Menzies on the phone and informed him that the State was trying to obtain a summary judgment, but that Menzies should not worry about it as it was the State who had a discovery stay in place (Exhibit 17).

The findings are inadequate because they interpret Menzies' keeping Brass after he learned of the summary judgment as intentional acquiescence in the delay of his case (R. 3750 n.10). The court found:

> A March 5, 2003 journal entry is indicative of Petitioner's intention in this regard:
>
> > Saw Ed Brass. (Yea! Surprise, surprise!) Ed came out to tell me that he has put a motion in to Judge Lewis to set aside part of my habeas that Judge Uno screwed me on just before he left (retired). He said that Judge Lewis was prepared to rule in my behalf but that because she was such good friends with Ed and Amy (she even married them), that it might be a conflict of interest for both him to represent me & her to be my judge. He told me I had to choose between him & Judge Lewis. I told Ed it was a no brainer. He was my attorney & I didn't want a new attorney under

> any circumstances and while I like Lewis, I would rather she left than him[.]
>
> Even with the prospect that a judge would rule in his favor on the motion to set aside if he gave up Mr. Brass as his attorney, and in the context of his repeated complaints about the progress of his case and his expression of frustration with Mr. Brass's representation, Petitioner still indicated that he "didn't want a new attorney under any circumstances."

(R. 3750 n.10).

In the finding regarding the March 5, 2003, journal entry, the trial court was well within his discretion in believing Menzies' version of events over Brass's.[76]

However, the court's findings do nothing to account for Brass's extreme misconduct implicit in the March 5, 2003 journal entry, which demonstrates that Brass was either misleading Menzies to believe that he had had *ex parte* contact with Judge Lewis regarding this capital case,

---

[76]Menzies testified that during the prison visit, Brass told Menzies he would have to choose between having Brass for a lawyer or Judge Lewis for a judge, because of the friendship between Brass and Lewis (R. 4126 at 166). Brass told Menzies he had filed a motion to reinstate the case, and that she was prepared to rule on it, but that Menzies would have to choose between them because of their friendship (R. 4126 at 167). Menzies felt the choice was a "no brainer," and chose Brass (R. 4126 at 167). Menzies denied that Brass told him that he needed a new lawyer on his case after the summary judgment order entered (R. 4126 at 197), but said that Brass did mention the possibility of a new lawyer in conjunction with the discussion about Judge Lewis having the case (R. 4126 at 203).

Brass, however, adamantly denied discussing the need for Judge Lewis's recusal during the March 5, 2003 meeting (R. 4125 at 99). Brass claimed that when he saw Menzies on that date, he told Menzies that some other lawyer would have to argue the motion to set aside the summary judgment to be effective, but that Menzies was not willing to accept a new lawyer (R. 4125 at 96). Brass said they left the issue up in the air, with Menzies believing that Brass was still his lawyer, and that Brass did not tell him there was a federal statute of limitations running or that the summary judgment would impact his federal rights (R. 4125 at 96-97).

The record indirectly supports Menzies' and the trial court's account of the conversation regarding Judge Lewis. See R. 2273 (letter from Assistant Attorney General Thomas Brunker dated February 27, 2003, reflecting that Brass had informed him by letter concerning a "potential disqualification issue" – that Brass had represented her in a concluded civil matter, and that she had performed his wedding in 1999).

or that Brass actually did have *ex parte* contact with Judge Lewis.

The court's reasoning in this finding is also fundamentally flawed. Menzies' opting to keep Brass rather than have Judge Lewis set aside the summary judgment does not demonstrate a knowing acquiescence in delay, but instead dramatically demonstrates the fallacy in the trial court's ruling imposing a duty on Menzies to act as a reasonably prudent person. The March 5, 2003 journal entry demonstrates Menzies' failure to understand the law and the starkly destructive nature of the representation Brass was actually providing, and Menzies' inability to make reasonably prudent litigation decisions in this capital post-conviction case. See id.

Menzies' acquiescence to delay was not a voluntary choice, but was the result of Brass's misleading Menzies, of the gross imbalance of power between Menzies and Brass and of Menzies' fear that if he harassed Brass about time, Brass would quit representing him (R. 4126 at 195; 4125 at 76-77, 80-81, 137). Compare Menzies' journal, Exhibit 21 (detailing his profound anxiety and frustrations with Brass's failure to communicate and with the delays) with Menzies' letters to Brass, Exhibits 6-12, 14-17 (largely flattering and diplomatic in tone, even after Brass partially informed Menzies of the summary judgment).[77]

The court's quotation of Menzies' March 5, 2003 journal entry, *supra*, is also incomplete in a key respect. The piece missing from the court's findings reflects that Menzies believed Brass's representation that he would try and have Judge Lewis set aside the summary judgment before recusing herself. It states:

---

[77]Copies of the written correspondence between Menzies and Brass are in the addendum.

> Ed said cool & that he would try to have her sign the order for me to set aside Uno's fuck-up before she got off my case! (Right on Ed Brass! You're cool & a good man.)

(Exhibit 21). Menzies testified that he knew that Brass was "taking care of business" after the March visit, because Brass looked at him and gave him his word, telling Menzies that it was not Menzies' problem and not to worry and that Brass would take care of it (R. 4126 at 168).

A complete and accurate reading of the March 5, 2003 evidence thus confirms that Menzies was misled by Brass to believe that Brass would cure the summary judgment, and contradicts the trial court's analysis that Menzies' failure to fire Brass demonstrates a knowing acquiescence in the delay of his case, or justifies Menzies' being held responsible for Brass's defaults.

In addition to failing to recognize Brass's misleading Menzies, the trial court's findings are clearly erroneous in several respects. The court found, "Moreover, attorneys Richard Uday, Lynn Donaldson, and Amy Brass all testified at the evidentiary hearing that Petitioner repeatedly complained to them about the lack of communication with Mr. Brass, Mr. Brass's ineffective representation, and the lack of progress in his case." (R. 3747).

The portion of the finding characterizing Amy Brass as one of the lawyers Menzies complained to is clearly erroneous and there is no evidence to marshall in support of it. Amy Brass is not a lawyer (R. 4125 at 35-36). The finding is not just inaccurate, but is incomplete in failing to acknowledge that Amy Brass is Brass's wife and Menzies' friend, who visited Menzies in prison, corresponded with him in writing, took his phone calls at home and at work, and allayed his concerns, telling him to trust in Brass and that she would personally investigate his case (e.g. R. 4125 at 22-37; Exhibit 1, bates stamp 232, 226, 243-250 and pages

to the end of the exhibit, Exhibit 21 *passim* and Exhibit 22, entries from November 22, 1999 through June 23, 2000). The finding does not acknowledge Menzies' testimony that he was influence by Amy Brass to keep Ed as his lawyer because she was always honest with him and because Brass had Amy talk to Menzies when Menzies was frustrated by his inability to reach Brass (R. 4126 at 162).

The finding is also incomplete in failing to acknowledge the repeated advice that Menzies received when he complained to experienced criminal defense attorneys Lynn Donaldson, Richard Uday, Vernice Ah Ching Trease, two of whom were Menzies' friends, and one of whom was Menzies' relative; they told him to keep Brass as his lawyer, and to expect him not to communicate, but to ultimately provide excellent representation (R. 4125 at 18-20, 38-45, 57-61). The finding does not account for Uday's testimony that he advised Menzies that should keep Brass even after the entry of summary judgment, because that would focus Brass's attention on the case and because Brass was capable of having it set aside (R. 4125 at 41-49). The finding does not reflect the effect the advice had on Menzies, who was persuaded by these lawyers, friends and relative to believe that Brass would eventually come through for him (R. 4126 at 162).

The court found that "Petitioner's journal indicates that he had no contact with Brass for nearly an entire year, from January 23, 2002 to January 13, 2003." (R. 3747-48).

This finding is clearly erroneous, because Menzies' January 2, 2003 journal entries reflect his receipt of Brass's letter informing him of the summary judgment, stating:

> Got letter from Ed Brass. He said state got a summary judgment against me, for I don't know what. Weird Letter.
> Wrote Brass a letter- Have a copy, Told him I thought he was awesome, but left

my life up to him. (See file for copy of letter to Brass)

The findings are incomplete in indicating that there were no hearings from the beginning of 1999 to 2002 (R. 3748), because the length of time without hearings was actually longer. The last hearing before the defaults was the hearing on the State's motion to dismiss on December 22, 1998, wherein Brass sought time to file a memorandum opposing Menzies' deposition (R. 4136 at 13), and the first hearing after the defaults was on August 21, 2003, the first scheduling hearing with present counsel (R. 4123). The lack of hearings does nothing to establish that Menzies should be held accountable for Brass's defaults as the court reasoned (R. 3748), but instead was one of the key due process problems with the default rulings, see, e.g., Christiansen v. Harris, *supra.*

The findings are clearly erroneous in reflecting that Brass was removed at Menzies' request (R. 3749). Even after the filing of the affidavits from Brass and Menzies reflecting that Brass had defaulted away Menzies' rights without Menzies' knowledge or consent, the court would not remove Brass until he moved to withdraw (R. 4129 at 9-10, R. 4128 at 4).

The findings are clearly erroneous in reflecting that present counsel was appointed to represent Menzies in September of 2003 (R. 3749). Present counsel was not appointed until after the 60(b) motion was fully briefed and argued and was supposed to be decided, on November 6, 2003, despite motions for appointment of counsel filed August 12, 2003 (R. 4128 at 7, 4130 at 4).

The court's reasoning that Brass's removal and present counsel's appointment show Menzies' knowledge and ability to obtain assistance from the court (R. 3749) is flawed, because these events occurred long after the defaults entered and did not give Menzies notice that he

should have dismissed Brass or contacted the court before the defaults entered or show him that he would succeed if he did.

The court found, "In a March 4, 1999 entry, it is clear that Petitioner is aware that an amended petition for post-conviction relief has not yet been filed." (R. 3748 n. 9).

This finding is clearly erroneous and there is no evidence to marshall in support of it. The amended petition actually had been filed on August 31, 1998 (R. 1231-32), and the relevant journal entry reflected that Menzies had not seen it and did not know if the amended petition had been filed. See Exhibit 21, March 4, 1999 entry.

The court found, "In a journal entry dated December 22, 1998, Petitioner states that he received copies of the State's motion to dismiss and motion to compel his deposition." (R. 3748 n.9).

The finding is partially clearly erroneous. The journal entry refers to a court hearing, wherein Menzies was present for argument on the motion to dismiss, but does not reflect that Menzies received a copy of the motion. See Exhibit 21, December 22, 1998 entry. Menzies' having received a copy of the motion to compel his deposition did nothing to inform him of the default rulings or the documents which led up to them, which Menzies did not receive (R. 2307, R. 4125 at 15, Exhibit 1, bates stamps 235-241, Exhibits 21 and 22, *passim*).

The trial court made several factual findings that are essentially correct, but do not support the conclusion that Menzies is fairly held responsible for Brass's defaulting his case away.

The court found that Menzies was not a typical inmate, and must have been aware of the problems with his case, because he had a 1991 certificate of completion for a basic paralegal

skills course (R. 3748; Exhibit F). This certificate from Boca Raton, however, does nothing to buttress the fact that Menzies was aware of the problems with Brass's representation, as the court reasoned (R. 3748), or to qualify Menzies to assess the legal issues in his capital post-conviction case, see Utah R. Crim. P. 8, ABA guidelines, *supra.*

The court relied on Menzies' having authorized the filing of the original post-conviction petition in concluding that Menzies bore some personal responsibility for monitoring his case (R. 3742-44), but failed to acknowledge that Menzies was represented by four lawyers at the time of the filing of the original petition, which was drafted by counsel (R. 1-41), and failed to explain why his authorizing the filing of the petition made him responsible to monitor his case, when he later lost the four *pro bono* attorneys so he could have rule 8 qualified counsel to litigate his case with expertise.

The court correctly found that Menzies maintains his innocence (R. 3748), was aware that delaying his investigation might be fatal (R. 3744), was aware of the passage of time (R. 3745-46), was not receiving legal documents and was largely unable to reach Brass by phone (R. 3746 and n.8), and wrote Brass letters asking about the status of his case, asking about how Brass's failure to file a response to the state's motion to dismiss would effect his case, and expressing concerns about hiring an investigator and experts and about his inability to communicate with Brass (R. 3747). The court correctly noted that Menzies complained to Lynn Donaldson when he substituted for Brass at a hearing, and that Menzies knew that Brass did not attend or give him notice of the first deposition attended by the unqualified substitute lawyer (R. 3747-48).

However, none of these facts is fairly read as a knowing or intentional waiver of Menzies' many constitutional rights that were forfeited in the entry of any of the specific default rulings,

see Wingo, *supra*, or fairly supports the conclusion that Menzies should be held responsible for the default rulings when he was not in a position to oppose the rulings for total lack of notice, see Christiansen, *supra*.

The court was correct that Menzies knew that contacting the court was achievable, and had done this and contacted the Utah State Bar in the past (R. 3749). However, the findings are inadequate in failing to note the many times on the record when Menzies' complaints to the court were disregarded or minimized.[78] There is nothing to indicate that any of Menzies' contacts with the court gave him any notice of Brass's defaults, in any event.

The findings fail to account for Brass's testimony that during the course of Brass's representation, Menzies complained about having trouble remembering things, tracking things, and focusing when he was under stress, or for Menzies' legal calendar, which documents his being on Prozac and Zoloft, and being ill and treated for depression, hepatitis C and high blood pressure (R. 5125 at 75-76, Exhibit 22).

The court's findings do not account for the three-month search for a qualified lawyer to take Menzies' case, during which several attorneys expressly refused to take the case, and after which Brass was the only attorney found who was both willing and able to take the case (R. 4131 at 3-6, 7-9; R. 1159-60, 1162-69, 1182-84, 1213, R. 4135 at 1-2). The findings do not account for the effect the three-month search had on Menzies, who was influenced to keep Brass by the lack of a viable alternative lawyer (R. 4126 at 168).

---

[78]See R. 4160 at 42-44 (Menzies complained of having no opportunity to talk to Corporon, and Judge Uno indicated that he was concerned about this, but did nothing about it); R. 4121 at 65 (Menzies volunteered to explain why he thought his calls with counsel were being recorded, but court did not respond); R. 1139 (Menzies filed a *pro se* "notice of termination of counsel and request for a hearing" which was never addressed by the court).

The findings also do not account for Menzies' history of difficulty reaching the *pro bono* lawyers before Brass took the case (e.g. Exhibits 21 and 22, *passim*; R. 4160 at 42; R. 1044; R. 4126 at 196 and 174, R. 4125 at 40), demonstrating that his inability to reach Brass appeared normal.

The court's findings do not acknowledge that once Menzies was given complete and accurate information regarding Brass's numerous defaults, he did contact the court and ask to have Brass replaced (R. 2280-2353).

The trial court's findings and ultimate conclusion holding Menzies responsible for the defaults are also inadequate, because they do not identify any particular event in the process that triggered Menzies' obligation to dismiss Brass or to begin contacting the court, and do not establish that his having done so at that particular time would have made any difference.

Assuming *arguendo* that the non-habeas civil lawyer-client agency theory could be applied in an indigent capital habeas case, consideration of the accurate history of this case, discussed above, leads to the conclusion that Menzies should be granted relief from the defaults.[79]

III.
THIS COURT SHOULD AUGMENT THE TRIAL COURT'S EFFORTS TO CURE ITS VIOLATION OF SALT LAKE LEGAL DEFENDER ASS'N v. UNO.

---

[79]See, e.g., Brown v. Butler, 554 S.E.2d 431, 434 and nn. 15 and 16 (S.C.App. 2001)(the lawyer-client agency rule "not a hard and fast rule," but is a rule that must be "applied rationally, with a fair recognition that justice to the litigants is always the polestar," and which has no application when a lawyer outrageously violates his duty to devote reasonable efforts to the client); Community Dental Services v. Tani, 282 F.3d 1164, 1171 (9th Cir. 2002) (when attorney failed to obey court orders and failed to oppose motions and otherwise defaulted, court recognized that client received "almost no representation at all" and that gross negligence of attorney justified relief under the catch-all subsection of federal rule 60(b)); L.P. Steurt Inc. v. Matthews, 329 F.2d 234 (D.C. Cir.) (client entitled to relief under catch-all of federal rule 60(b), because case defaulted as a result of counsel's gross neglect of the case and misleading of the client), cert. denied, 379 U.S. 824 (1964).

The court ordered an evidentiary hearing solely on all communications between Menzies and Brass concerning the status of the post-conviction case during the period of Brass's representation of Menzies (R. 3172-73).

In discovery prior to the hearing, the State subpoenaed all of Brass's records and sought communications between Menzies and all of his prior lawyers on the theory that perhaps Corporon and the other *pro bono* lawyers had conducted an unfruitful or damaging investigation, which might explain Brass's defaults, or Menzies' not worrying about the case's failure to progress (R. 3347, 3481-83, 3345-46).

Counsel for Menzies informed the court and State that there was no such unfruitful or damaging investigation (R. 4127 at 19-20), objected to the State's production request and subpoena, filed an index of withheld documents, and moved for a protective order and for permission to file the withheld documents under seal (R. 3495-3500). In the supporting memorandum, counsel informed the court that he should follow Salt Lake Legal Defender Ass'n v. Uno, 932 P.2d 589 (Utah 1997) (R. 3404-3509).[80]

The court refused to comply with Uno, indicating that he would not permit counsel for Menzies to file anything *in camera*, and that he would not take anything off the record or in

---

[80]Uno and Utah R. Civ. P. 26(b)()3) require courts to review documents privileged by the work product doctrine *in camera*, and to determine whether the seeking party can show a substantial need for the documents, that the party cannot obtain the information elsewhere without undue hardship, that the "at issue" exception to the work product doctrine applies, and that the documents are properly redacted to include only essential information. Id. at 590.

chambers (R. 4127 at 8).[81] The court denied Menzies' motion for a protective order, permitted the subpoena to stand, and ordered Menzies to provide the State with all documents on the index of withheld documents (R. 3618).

At the evidentiary hearing, when the State began to refer to some of the privileged documents, counsel for Menzies objected and the court agreed to review the Uno decision and the State's exhibits from the index of withheld documents (R. 4125 at 104-107, 115-119). After this review, the court ruled the documents inadmissible and ordered the State to shred all copies of the documents at the conclusion of the hearing that day, and forbade them to perpetuate or disseminate the information in the documents in any way (R. 4126 at 124).

However, he permitted the State to use the documents during the hearing, and required them to approach the court first at sidebar and make a compelling showing that the information they sought could not be obtained in any other way (R. 4126 at 125-129).

This ruling was a misapplication of Uno and Utah R. Civ. P. 26(b)(3), both of which require parties to make similar showing before obtaining privileged documents. See id. This also violated Utah R. Evid. 507(b)(1), which provides that privileged information is inadmissible when its disclosure was erroneously compelled. See id.

During the evidentiary hearing, the State used information from various of the documents from the index of withheld documents to cross-examine Brass and Menzies, at time approaching the bench before referring to these matters, and at times not (R. 4126 at 176-203).

---

[81]While the trial court would not permit counsel to file the withheld documents *in camera* pursuant to Uno, in the event that this Court feels that analysis of the documents is essential to resolution of this issue, the Court may order the record supplemented with a sealed copy of the documents. See Utah R. App. P. 11(h) (if anything material is omitted by error, this Court may order the record supplemented).

The court made no record of the bench conferences. This process was likewise unlawful, because the evidence should not have been admitted because it was improperly compelled, and because the proceedings should have been on the record.[82]

Counsel for the State did not comply with the court's order to destroy the information from the index at the conclusion of the hearing on January 16, 2004 (R. 4126 at 124). The State initially indicated that the State only had one shredder with which to comply with the court's order, and then indicated that all the materials from the index of withheld documents were still in a box (R. 4134 at 46). Then at a hearing on proposed orders, the State's representative indicated that she believed she had independent sources for at least two of the documents on the index of withheld documents, and that the State should be allowed to keep these documents (R. 4134 at 42-43). She was imprecise in identifying the independent source, indicating that the State "might have copies of those that were already in [their] file from LDA" (R. 4134 at 43-45), and that the State "may have some of the information from other sources" or "from some other person." (R. 4134 at 48-49). When the court asked if she could identify the specific documents the State had independent sources for, she said she was "not sure" she could do that (R. 4134 at 37).

The court did not require the State to identify which documents from the index it had already obtained from independent sources, and signed the State's proposed order, which does not give the State a deadline to complete the destruction of the documents, and permits the State

---

[82]See Uno, 932 P.2d at 590 (requiring full analysis prior to disclosure); Utah R. Evid. 507 (privileged information is inadmissible when its disclosure was erroneously compelled); State v. Suarez, 793 P.2d 934, 936 n.3 (Utah App. 1990)(in courts of record, all proceedings, including bench conferences, must be recorded).

to obtain new copies of the documents on the index and to investigate and disseminate matters encompassed in the index of withheld documents addressed in the evidentiary hearing or for which the State has independent sources (R. 3899-3903).

While the court did not expressly rely heavily on information from the index in denying relief under 60(b),[83] his efforts to cure his violation of Uno were incomplete and must be augmented.

It is critical that the Uno decision and Rule 26(b)(3) be followed scrupulously in capital cases, where the effective functioning of the attorney-client relationship requires great trust and preparation, both of which are undermined if the State is given improper access to the files of capital counsel. See id. at 591. Uno and 26(b)(3) must be followed scrupulously to "protect to the maximum extent possible the integrity of attorney work product necessary in criminal cases and protect criminal defendants from prejudicial disclosures not relevant to ineffectiveness claims."

The State should never have had the privileged information without the trial court's full compliance with Uno, and should not be permitted to keep or investigate the information. See id. The final order should so indicate, and should require the State to identify the documents from the index for which it claims to have an independent source. See id. at 591 ("There is simply no way to protect against improper use of information[.]"). The final order should have a due date by which the State must destroy the information from the index. Cf. id.

IV.
THIS COURT SHOULD INSURE THAT JUSTICE IS DONE.

---

[83]The court relied on the journal entry testimony in his final decision, referring to Menzies' contacting court clerks (R. 3749).

To the extent that present counsel for Menzies failed to perfectly preserve all issues in the trial court, this Court should nonetheless correct the errors under the plain error doctrine, which permits the Court to correct obvious and prejudicial errors, and highly prejudicial errors which were less obvious.[84] Constitutional errors are particularly appropriate for correction under the plain error doctrine.[85]

The principles of law relied on herein are all fundamental, and were well-established at the time of the 60(b) proceedings, and their application should have been obvious to the trial court. To the extent that present counsel failed to articulate the law properly in the trial court, this could not have been strategic or beneficial to Menzies, and was not in an effort to mislead the trial court into error. Particularly given the fatal prejudice that would result from failing to apply the correct law, this Court should correct all errors that were not properly preserved, even if they should not have been obvious to the lower court. See Eldredge, *supra.*

Given that this is a capital habeas case, this Court has the upmost procedural flexibility to insure that justice is done, for courts in habeas corpus proceedings exercise broad and flexible equitable powers. "The very nature of the writ demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected."[86] Habeas corpus gives courts the "ability to cut through barriers of form and procedural rules," id., recognizing that excessive procedural formality must "yield to

---

[84]See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989).

[85]See, e.g., United States v. Lindsay, 184 F.3d 1138, 1140 (10th Cir.), cert. denied, 145 L.Ed.2d 343 (1999).

[86]Harris v. Nelson, 394 U.S. 286, 291 (1969).

the imperative of correcting ... unjust incarceration." Engle v. Isaac, 456 U.S. 107, 135 (1982).

Particularly given the important policy questions this case presents regarding procedures to be followed in Utah capital post-conviction cases, in resolving this appeal, this Court should exercise its inherent supervisory powers "to protect the fundamental integrity of the judicial branch" and "to insure that the judicial process is not abused."[87] The exercise of these powers is "especially appropriate when fundamental values are threatened by other modes of proceeding." State v. James, 767 P.2d 549, 577 (Utah 1989).

Finally, this Court should resolve this case consistently with the standard Utah practice of granting relief from default judgments and giving people their day in court in doubtful cases, and in cases wherein the defaults are caused by genuine mistakes or are justified by reasonable explanations.[88]

"[W]hen it appears that the processes of justice have been so completely thwarted or distorted, as to persuade the court that in fairness and good conscience the judgment should not be permitted to stand, relief should be granted."[89]

CONCLUSION

This Court should grant Mr. Menzies relief from the default summary judgment order and preceding default orders and remand this case for expeditious completion of his state post-conviction proceedings.

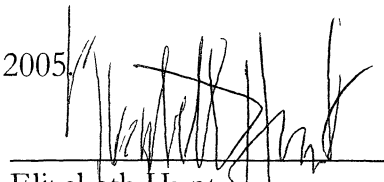
---

[87]See In re Criminal Investigation, 754 P.2d 633, 637 (Utah 1988) (citations omitted); Constitution of Utah, Article VIII § 4 (Court has authority to adopt rules of evidence and procedure); State v. Bennett, 2000 UT 34, ¶ 13, 999 P.2d 1 (Durham, J., concurring)(listing several cases in which the Court has exercised its supervisory powers).

[88]See Lund v. Brown, 11 P.3d 277, 280, 2000 UT 75 at ¶¶ 9-11.

[89]Haner v. Haner, 373 P.2d 577, 578 (Utah 1962).

Respectfully submitted on May 27, 2005.



Elizabeth Hunt
Counsel for Mr. Menzies

CERTIFICATE OF HAND DELIVERY

I hereby certify that on May 27, 2005, I hand-delivered two true and correct copies of the foregoing to Assistant Attorneys General Thomas Brunker and Erin Riley, 160 East 300 South, 6th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854.